

August 18, 2016

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**Re: Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online
(Docket No. 2016-3)**

Dear Mr. Damle:

The University of Michigan Library Copyright Office is pleased to submit this comment on behalf of the University of Michigan Library (“UM Library”).

The UM Library’s mission is “to support, enhance, and collaborate in the instructional, research, and service activities of the faculty, students, and staff, and contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge.”¹

Mandatory deposit has long played a central role in Library of Congress (“LC”) print acquisitions.² It also “creates a unique opportunity for [LC] to collect digital information that might otherwise vanish from the historical record.”³ In 2010, LC and the U.S. Copyright Office sought to harness some of this opportunity with an interim rule that created the eDeposit program for online-only serials. The interim rule and the policies LC has adopted to implement it are effective. The UM Library strongly supports extending them to cover online-only books and sound recordings.

UM Library’s Interest in and Experience with These Issues

One reason the interim rule focused on serials was that some online-only serials are distributed only via subscription services and cannot be purchased outright, either by libraries or by end users. This generally prevents libraries from acquiring preservation copies, but the interim rule provides a mechanism for LC to acquire preservation copies of those works and to provide limited access to them.

¹ *About the Library*, University of Michigan Library, <http://www.lib.umich.edu/about-library> (last visited Aug. 11, 2016).

² Committee on an Information Technology Strategy for the Library of Congress, et al., *LC 21: A Digital Strategy for the Library of Congress* 83 (2000) available at <http://www.nap.edu/download/9940> (“Receipts from the Copyright Office constitute the core of the collection . . .”).

³ *Id.* at 93.

At the UM Library, we have experienced related acquisitions problems involving online-only books and sound recordings. Many online-only books and sound recordings are distributed subject to End User License Agreements (“EULAs”) that allow only personal use of those works. This prevents us, as a library, from acquiring copies of the works. In the short term, this is unfortunate, because it means we are not able to provide our patrons access to these works. In the long term, this distribution model has broader and potentially more serious consequences. As a society we rely on libraries, including the UM Library and LC, to preserve our cultural heritage. When a particular work is distributed in a way that prevents all libraries from acquiring it, that puts the work at serious risk of being lost. Expanding the interim rule to cover online-only books and sound recordings would help address this crisis by ensuring that LC is able to collect and preserve these works when they are published in the United States.

One item of which we were unable to acquire a copy is the 2008 Grammy-winning Los Angeles Philharmonic recording of *Symphonie Fantastique*. We have since been able to provide patrons access to this recording via a subscription streaming music database, but we still do not have a preservation copy. Our music library also collects music in several popular genres, including rock, rap, and reggae, as well as video game music. Many recordings in these areas are off-limits to us due to their distribution models.⁴

On the ebook side, we see similar trouble: items we would normally collect and preserve copies of, that are crucial to research and teaching at the University, are available only via digital distribution under a EULA. These works come from many subject areas, including technology law (*The Internet of Garbage*⁵), earth science (*Processes in Structural Geology and Tectonics*⁶), nonprofit organizations (*GuideStar 2015 Nonprofit Compensation Report*⁷), design (*Design + Code*⁸), English language (*Text Complexity: Supporting Student Readers, Grades 9-12*⁹), education (*Finish Your Dissertation, Darling!*¹⁰), music (*Drum Diaries*¹¹), and anthropology (*Coffee House Positano: A Bohemian Oasis in Malibu, 1957-1962*¹²).

At present, the items affected by these distribution models form only a very small percentage of the items we seek to acquire. However, we expect the percentage to increase. In our own publishing at the University of Michigan Press and Michigan Publishing Services, we have produced some online-only works that might not be acquirable by libraries. In some cases, we

⁴ The National Forum on Online-Only Music, a project at the University of Washington funded by a grant from the Institute of Museum and Library Services, created a list of examples of online-only music. National Forum on Online-Only Music, *Online-Only Music Roster*, Sound Recording Collecting in Crisis, http://guides.lib.uw.edu/research/imls2014/imls2014_roster (last visited Aug. 11, 2016).

⁵ Sarah Jeong, *The Internet of Garbage* (2015). Available only for end users via Amazon Kindle and Apple iBooks.

⁶ Ben van der Pluijm and Stephen Marshak, *Processes in Structural Geology and Tectonics* (2016). Available only for end users via <http://psgt.earth.lsa.umich.edu>.

⁷ GuideStar, *GuideStar 2015 Nonprofit Compensation Report* (2015). Licensable for use by one person or by 2 to 25 people via <https://learn.guidestar.org/products/nonprofit-compensation-solutions/guidestar-nonprofit-compensation-report>.

⁸ Meng To, *Design + Code* (2016). Available only for end users via <https://designcode.io>.

⁹ Anne Ruggles Gere, et al., *Text Complexity: Supporting Student Readers, Grades 9-12* (2014). Available only for end users via Amazon Kindle, Apple iBooks, and Barnes & Noble Nook.

¹⁰ Joan Rodman, *Finish Your Dissertation, Darling!* (2015). Available only for end users via Amazon Kindle and Barnes & Noble Nook.

¹¹ Michael Gould, *Drum Diaries* (2012). Available only for end users via Apple iBooks.

¹² Jay Ruby, *Coffee House Positano: A Bohemian Oasis in Malibu, 1957-1962* (2014). Available only for end users via Amazon Kindle and Apple iBooks.

publish on third-party platforms (e.g., Apple iBooks or Amazon Kindle) that do not support library acquisition. In other cases, the technical infrastructure of the work, even though it is developed in house, does not lend itself to selling copies; it is better suited to selling access. An example of such a work is *A Mid-Republican House from Gabii*,¹³ an archaeology title that includes 3D models and a database of artifacts and contexts in addition to a textual narrative.

In all of these cases, however, we see strong benefits to enabling LC to demand deposit of these works. When one of our works is held by LC, it is more discoverable. Being listed in LC's catalog can help drive interest in the work. Being held by LC also has the potential to increase the influence of a work. This is especially important to those of our authors who are publishing in order to put their research into the hands of policymakers, which is a common motivation for making works open access. Finally, when LC holds these works, they have a better chance of being remembered, of being prioritized for preservation, and thus of being available for future scholars.

Efficacy of 2010 Interim Rule and its Appropriateness for Online-Only Books and Sound Recordings

The UM Library has direct experience with the 2010 interim rule because the *Journal of Electronic Publishing*, which is published by Michigan Publishing, was in the first batch of online-only serials for which LC issued a demand back in 2010.

The interim rule is imperfect. It takes a very cautious approach to security concerns, at the expense of LC's users. The policies implementing it, which will be discussed further below, could also be more convenient for depositors. However, the interim rule is certainly preferable to the pre-2010 practice of exempting all online-only works from mandatory deposit. It is a good framework for further developing section 407.

In the long term, we hope LC will be able to provide greater access to many online-only works. The interim rule is appropriately technology-neutral on the issue of access. Many of the planned access restrictions come instead from LC's policies, which will be discussed further in the next section.

Even if greater access cannot be arranged in the near term, it is vital that online-only books and sound recordings be included in the mandatory deposit regime. At the least, that will enable LC to make a copy of the work available for full use when it enters the public domain. Film history provides a sobering lesson here; many films from the early days of American cinema are completely lost today, including 70% of silent-era feature films.¹⁴ However, copyright deposit plays an unexpected and heroic role in this story. The Library of Congress's Paper Print Collection, which resulted from copyright deposit, contains copies of over 3,000 films, many of which only survive due to those deposited paper copies.¹⁵

¹³ *A Mid-Republican House from Gabii* (Rachel Opitz, Marcello Mogetta, and Nicola Terrenato, eds.) (forthcoming December 2016).

¹⁴ David Pierce, *The Survival of American Silent Feature Films: 1912-1929* 1, 15 (2013) available at https://www.loc.gov/programs/static/national-film-preservation-board/documents/pub158.final_version_sept_2013.pdf ("Humorist and commentator Will Rogers was one of the most well-known and beloved American public figures of the 1920s. He starred in 16 silent features, of which only 5 survive.").

¹⁵ *Early Motion Pictures Free of Copyright Restrictions in the Library of Congress*, Moving Image Research Center, <https://www.loc.gov/rr/mopic/earlyimps.html> (last visited Aug. 11, 2016).

The Library's Adopted Policies as to the Interim Rule and/or Their Application to Online-Only Books and/or Sound Recordings

As mentioned above, the adopted access restrictions are, if anything, overly cautious. We hope in the future LC will be able to provide greater access to many deposited works than is contemplated by the adopted and proposed policies. We are glad to see that LC intends to continue work in that area. In particular, we hope LC will explore ways to provide access similar to that allowed for deposited analog works (for example, interlibrary loan), while addressing the special security concerns presented by electronic works.

For instance, asking the depositor to indicate whether any public licenses, such as Creative Commons licenses or open source software licenses, have been applied to the work could be helpful. Knowing about these licenses would give LC more flexibility in providing access to the deposited copy of the work.

We also hope LC will be able to explore other ways to make the process easier for depositors, particularly those who are open access publishers. The current process involves submitting a packaged version of the work and its metadata via a web form. Creating that package can be difficult. It would be excellent if LC were able to accept works and their metadata in ways that publishers are already distributing them, such as via ONIX for Books¹⁶ feeds from digital asset distributors such as Bibliovault, Firebrand, and CoreSource.

Information Technology, Security, and/or Other Requirements That Should Apply to the Library's Receipt and Storage of, and Public Access to, Any Online-Only Books and/or Sound Recordings Collected Under Section 407

The proposed security-related policies are more than adequate. If anything, they go too far in restricting access to the deposited works. As mentioned above, we look forward to LC's planned work exploring these policies and hope it will find a way to provide greater access while addressing security concerns.

It is crucial for preservation that the deposited copies not be encrypted or otherwise encumbered with DRM. That should be a component of the best edition criteria, just as it is for serials, and just as stated in the Recommended Formats Statement.

Application of "Best Edition" Requirements to Online-Only Books and/or Sound Recordings

The digital textual works and digital audio works sections of the Recommended Formats Statement should be adapted into best edition criteria for these online-only works. This adaptation should consider the preservation and access needs of LC, and the best edition criteria should be written to make it as easy as possible for LC to preserve the works. The best edition criteria for online-only books and sound recordings should require, as the criteria for online-only journals do,¹⁷ that the copies deposited be free of any technology that controls access to or use of the work. Thus, they should be unencrypted and free of DRM.

We also suggest that the "Completeness" section of the Recommended Formats Statement for digital textual works be clarified when it is adapted to create best edition criteria. In particular, part I.ii.D.2 of the Recommended Formats Statement asks for "[a]ll updates, supplements,

¹⁶ *ONIX for Books: Overview*, EDItEUR, <http://www.editeur.org/83/Overview/> (last visited Aug. 11, 2016).

¹⁷ 37 C.F.R. § 202, Appendix B, IX.A.3.

releases, and supersessions published as part of the work and offered for sale or distribution,”¹⁸ which is vague and leaves room for confusion and misinterpretation by depositors and enforcers. A clearer indication of what qualifies as a supplement would benefit all involved.

Respectfully submitted,


Ana Enriquez
Copyright Specialist

¹⁸ *Recommended Formats Statement: Textual Works and Musical Compositions*, Library of Congress, available at <https://www.loc.gov/preservation/resources/rfs/textmus.html> (last visited Aug. 11, 2016).